



October 18, 2000

Ms. Ruth H. Soucy
Deputy General Counsel
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2000-4057

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 140259.

The Comptroller of Public Accounts (the "comptroller") received four requests for the responses to the comptroller's "Request for Information Regarding Seat Management Program" (the "RFI"). The comptroller takes no position as to whether any of the requested information is excepted from required public disclosure. The comptroller believes, however, that the requested information may implicate the proprietary interests of the private parties who submitted responses. Pursuant to section 552.305 of the Government Code, the comptroller notified the private parties of the information request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). The comptroller also submitted the requested proposals to this office. This office received comments from two of the private parties, IBM and Litton PRC, Inc. ("PRC"). We have considered the arguments of IBM and PRC and have reviewed the information that the comptroller submitted.

Initially, we address IBM's claim that all of the requested information should be withheld from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not those of private parties that submit information to governmental bodies. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, section 552.104 is a discretionary exception to public disclosure that the governmental body may waive. *Id.* In this instance, the comptroller takes no position as to whether any of the requested information is excepted from public disclosure. Therefore, none of that information may be withheld under section 552.104.

Both IBM and PRC raise section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of

information: (1) trade secrets, and (2) commercial or financial information for which it is demonstrated, based on specific factual evidence, that disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). IBM confines its comments to section 552.110(b). PRC's arguments appear to invoke both components of section 552.110. Accordingly, we will begin by considering PRC's claim that portions of its response to the RFI constitute trade secret information under section 552.110(a).

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is the case here, the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See* Open Records Decision No. 552 at 5 (1990).

¹The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

PRC seeks protection for portions of its response to the RFI, which it characterizes as "PRC Proprietary Information." In support of its claim, PRC argues:

The information is of great value to PRC, because it outlines its successful and proprietary approach to seat management. PRC does not routinely disclose this information to others. PRC has spent a great deal of money independently developing its proprietary approach. And, PRC's competitors clearly could not develop this information without investing the same or even greater sums.

We have considered PRC's arguments and have carefully examined the information in question. We find, however, that PRC has not made the required *prima facie* showing that any of its information constitutes a trade secret under section 757 of the Restatement of Torts. We therefore conclude that the information for which PRC seeks exception may not be withheld under section 552.110(a). *See also* Open Records Decision No. 319 at 3 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing is not ordinarily trade secret material).

We next consider the claims of PRC and IBM under section 552.110(b) of the Government Code. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In seeking protection for its "PRC Proprietary Information" under section 552.110(b), PRC contends that "[r]elease of PRC Proprietary Information would cause substantial competitive harm to PRC." PRC elaborates as follows:

PRC Proprietary Information is confidential and proprietary to PRC in that it reflects PRC's detailed business and competitive strategies to accomplishing the RFI work and similar seat management work, including proprietary concepts developed by PRC, and includes significant amounts of proprietary information that PRC will use again in future competitions. The release of PRC Proprietary Information would reveal these fundamental components of PRC's technical approach. Knowledge of PRC Proprietary Information would give PRC's competitors a competitive advantage in future procurements, and, therefore, would result in irreparable harm to PRC.

Upon thorough consideration of PRC's contentions under section 552.110(b), we find that PRC has made a sufficient showing that Attachment 2 to its response to the RFI must be withheld from disclosure. Otherwise, we are not satisfied that PRC has made the required factual or evidentiary demonstration of a specific prospective risk of substantial competitive injury.

Therefore, we conclude that the comptroller must withhold PRC's Attachment 2. The rest of the responsive information relating to PRC is not excepted from disclosure under section 552.110(b). *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm).

IBM contends that several portions of its response to the RFI must be withheld under section 552.110(b). IBM asserts that the release of one part of its proposal requires prior approval from another client. With regard to other portions of its proposal, IBM argues:

Th[e] information should be withheld as it contains sensitive pricing [or project management] information. The release of this sensitive . . . information will cause IBM substantial competitive harm based on the fact Xerox will obtain access to IBM's sensitive . . . methodologies. IBM duplicates these methodologies on many efforts allowing IBM to remain price competitive in the marketplace. This price competitiveness is based on the sensitive and confidential nature of the process. IBM's ability to remain price competitive will be lost if this information is released[.]

We have considered these arguments and have examined the information that IBM claims should be withheld from disclosure. We find, however, that IBM has not made the necessary factual or evidentiary showing that the release of any portion of its response would result in any substantial risk of competitive harm. Accordingly, we conclude that none of the information relating to IBM is excepted from disclosure under section 552.110(b). *See* ORD 661 at 5-6.

In summary, the responses to the comptroller's RFI may not be withheld under section 552.104 of the Government Code. None of the information relating to PRC is excepted from disclosure under section 552.110(a), and none of the information relating to IBM is excepted under section 552.110(b). Attachment 2 to PRC's response to the RFI is excepted from disclosure under section 552.110(b), and the comptroller must withhold that information. The rest of the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

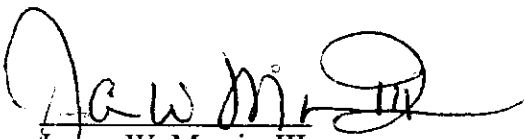
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/seg

Ref: ID# 140259

Encl. Submitted documents

cc: Ms. Christine Butterfield
Account Manager
Xerox Corporation
6838 Austin Center Blvd., Suite 300
Austin, Texas 78731
(w/o enclosures)

Mr. Hank Tebbe
Bluecurrent, Inc.
1101 Capitol Center
919 Congress Avenue
Austin, Texas 78701
(w/o enclosures)

Mr. Prekimi Tawari
EER Systems, Inc.
3750 Centerview Drive
Chantilly, Virginia 20151
(w/o enclosures)

Mr. Charles Ashley
IBM Corporation
400 West 15th Street
Austin, Texas 78701
(w/o enclosures)

Mr. Ken Beeman
Science Applications International Corporation
4242 Woodcock Drive, Suite 150
San Antonio, Texas 78228
(w/o enclosures)

Ms. Cynthia Kaye Jacobs
Science Applications International Corporation
10260 Campus Point Drive
San Diego, California 92121
(w/o enclosures)

Mr. Paul Mason
Affiliated Computer Services, Inc.
12107 Carlsbad Drive
Austin, Texas 78738
(w/o enclosures)

†

Mr. David T. Yelton
COMDISCO, Inc.
2505 North Highway 360, Suite 300
Grand Prairie, Texas 75050
(w/o enclosures)

Mr. Kirk Beasley
Electronic Data Systems, Inc.
919 Wild Valley
Houston, Texas 77057
(w/o enclosures)

Mr. Edward M. Oxford
Litton PRC, Inc.
12005 Sunrise Valley Drive
Reston, Virginia 20191
(w/o enclosures)

Mr. James M. Weitzel, Jr.
Associate General Counsel
Litton PRC, Inc.
1500 PRC Drive
McLean, Virginia 22102-5050
(w/o enclosures)

Mr. Robert L. Thrash
Unisys Corporation
4516 Seton Center Parkway, Suite 275
Austin, Texas 78759
(w/o enclosures)